



# Massachusetts Law Quarterly

Special Number, April, 1918.

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MASSACHUSETTS BAR ASSOCIATION, 16 Central St., Boston, Mass.

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## INTRODUCTORY STATEMENT.

It appears from an account of this Act, written on January 15, 1918, and printed in the February number of the "Illinois Law Review," that it was drawn with the assistance of Messrs. Mansfield Ferry, counsel to the Alien Property Custodian, Samuel Rosenbaum, draftsman to the American Judicature Society, and Prof. John H. Wigmore, now attached to the Judge Advocate General's Staff, and also connected with the Provost Marshal General's Department at Washington.

In order that the Act, the history and all the explanation relative to the Act, may be easily accessible to members of the Massachusetts Bar, the full text of the Act is printed first and then the introductory statements, explanatory notes to the different sections, and the discussion of the constitutionality of the Act as a whole are here reprinted by permission from the "Illinois Law Review." Copies of the Act have recently been furnished by the government to the American Bar Association and sent to all of its members.

The second edition of the little pamphlet prepared by the Boston Legal Aid Society, entitled, "Legal Suggestions for Soldiers and Sailors and their Dependents," was issued in April and contains a practical explanation, not only of the Soldiers' and Sailors' Civil Relief Act, but of the war insurance and other practical legal problems as to which assistance is needed.

The first edition of this little pamphlet was issued in July, 1917, and eight thousand copies of it were distributed not only to soldiers and sailors in Massachusetts, but to various persons and organizations in different parts of the country. It proved to be so useful that the Council of National Defence recommended to the various state councils and committees the preparation of a somewhat similar pamphlet. Sixty-eight thousand copies of the second edition have already been distributed.

The booklet was prepared by Reginald Heber Smith, Esq., Counsel for the Association. Copies may be obtained without charge by applying to "The Boston Legal Aid Society, 39 Court Street, Boston, Mass." Lawyers who are likely to advise may wish to have the same book of information which is furnished to the soldiers and sailors in the interest of mutual understanding.

In order to show the subjects covered by this book, the table of contents and a short preface are reprinted in a footnote.\*

\* LEGAL SUGGESTIONS FOR SOLDIERS AND SAILORS AND THEIR DEPENDENTS.

Published by  
The Boston Legal Aid Society, Reginald Heber Smith, Counsel,  
39 Court St., Boston.

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*Caution.*—The first edition of this handbook, published in July, 1917, is no longer correct because the laws have been greatly changed by the Act of October 6, 1917, concerning allowances, allotments, compensation, and insurance, and by the Soldiers' and Sailors' Civil Relief Act of March 8, 1918. Copies of this first edition should be thrown away.

Copies of this second revised and enlarged edition will be sent to any one in military or auxiliary service on request.

"A PREFACE

FOR YOUR PROTECTION.

During the past few months the United States Government has passed laws which guarantee to its fighting men the most complete and generous system of safeguards and benefits ever provided by any nation in the history of the world.

The purpose of this pamphlet is first to tell you what these provisions are and how you may secure their protection for yourself and those whom you leave at home, and second to suggest to you certain legal steps which it is desirable and businesslike for you to take before you leave for your training school or cantonment.

If you will read these few pages and apply their suggestions to the particular conditions in your own situation and then do the few simple things necessary to set these laws in motion in your behalf, you can surround yourself and those whom you love with every protection which it is humanly possible to have.

Remember that the American Red Cross and the Legal Aid Society are your friends. There is hardly a difficulty or perplexity which can arise after you have gone which they cannot take care of or adjust for you. It is an excellent thing for you to go with your wife, or mother, or sister to the Red Cross in your city (in Metropolitan Boston you should go to the Home Service Section of Boston Metropolitan Chapter of the American Red Cross at 142 Berkeley street) in order that they may know you. Then if any trouble comes, one of your family can notify the Red Cross, which will act immediately. If the difficulty is legal in nature or can be removed by legal action, the Red Cross will at once call on the Legal Aid Society. Neither the Red Cross nor the Legal Aid Society will make any charge whatsoever for anything they do for you. They are always at your service."

THE FULL TEXT OF THE "SOLDIERS' AND SAILORS'  
CIVIL RELIEF ACT."

[PUBLIC — NO. 103 — 65TH CONGRESS.]

[H. R. 6361.]

An Act To extend protection to the civil rights of members of the  
Military and Naval Establishments of the United States  
engaged in the present war.

*Be it enacted by the Senate and House of Representatives of the  
United States of America in Congress assembled,*

ARTICLE I.

GENERAL PROVISIONS.

SEC. 100. That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war.

SEC. 101. (1) That the term "persons in military service," as used in this Act, shall include the following persons and no others: All officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the National Guard and National Guard Reserve recognized by the Militia Bureau of the War Department; all forces raised under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve force, Marine Corps Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service detailed by the Secretary of the Treasury for duty either with the Army or the Navy; any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or of the Navy

Department; members of the Nurse Corps; Army field clerks; field clerks, Quartermaster Corps; civilian clerks and employees on duty with the military forces detailed for service abroad in accordance with provisions of existing law; and members of any other body who have heretofore or may hereafter become a part of the military or naval forces of the United States. The term "military service," as used in this definition, shall signify active service in any branch of service heretofore mentioned or referred to, but reserves and persons on the retired list shall not be included in the term "persons in military service" until ordered to active service. The term "active service" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service," as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person," as used in this Act, with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court" as used in this Act shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

(5) The term "termination of the war" as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President.

SEC. 102. (1) That the provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court.

Sec. 103. Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, indorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, indorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered.

## ARTICLE II.

### GENERAL RELIEF.

SEC. 200. That in any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

(2) Any person who shall make or use an affidavit required under this section knowing it to be false shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

SEC. 201. That at any stage thereof any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

SEC. 202. That when an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or

penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired.

SEC. 203. That in any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service:

(1) Stay the execution of any judgment or order entered against such person, as provided in this Act, and

(2) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, as provided in this Act.

SEC. 204. That any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others.

SEC. 205. That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

### ARTICLE III.

#### RENT, INSTALLMENT CONTRACTS, MORTGAGES.

SEC. 300. (1) That no eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$50 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.



(2) On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other order as may be just.

(3) Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor, and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(4) The Secretary of War or the Secretary of the Navy, as the case may be, is hereby empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person.

SEC. 301. (1) That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction.

(1a) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(2) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may



make such other disposition of the case as may be equitable to conserve the interests of all parties.

SEC. 302. (1) That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service —

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.

#### ARTICLE IV.

##### INSURANCE.

SEC. 400. That in this Article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article.

SEC. 401. That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits.

SEC. 402. That the benefits of this act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty per centum of the cash surrender value of the policy.

SEC. 403. That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this Article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval.

SEC. 404. That when one or more applications are made under this Article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies, or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately notify the insurer and the insured in writing of such selection.

SEC. 405. That no policy which has not lapsed for the non-payment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this Article, shall lapse or be forfeited for the non-payment of premium during the period of such service or during one year after the expiration of such period: *Provided*, That in no case shall this prohibition extend for more than one year after the termination of the war.

SEC. 406. That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, for the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policy holder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been

previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference.

SEC. 407. That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer.

SEC. 408. That the Secretary of the Treasury shall, within ten days thereafter, deliver each month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of \$100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: *Provided*, That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligation on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance.

SEC. 409. That the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained.

SEC. 410. That in the event that the military service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

SEC. 411. That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided*, That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war.

SEC. 412. That at the expiration of one year after the termination of the war there shall be an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

(1) The total amount of the monthly differences reported under this Article;

(2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

SEC. 413. That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article.

SEC. 414. That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium.

SEC. 415. That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service.

## ARTICLE V.

## TAXES AND PUBLIC LANDS.

SEC. 500. (1) That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c), that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war.

(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty of interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon.

SEC. 501. That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to

perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section contained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the Act entitled "An Act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war," approved July twenty-eighth, nineteen hundred and seventeen; the Act entitled "An Act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war," approved August seventh, nineteen hundred and seventeen; the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," approved August tenth, nineteen hundred and seventeen: the joint resolution "To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July seventeenth, nineteen hundred and seventeen; or any other Act or resolution of Congress; *Provided*, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any proof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense, or further assertion of any rights initiated prior to entering military service, before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office.

#### ARTICLE VI.

##### ADMINISTRATIVE REMEDIES.

SEC. 600. That where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since the date of the approval of this Act been transferred or acquired with intent



to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made the provisions of this Act to the contrary notwithstanding.

SEC. 601. (1) That in any proceeding under this Act a certificate signed by The Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army, signed by the Chief of the Bureau of Navigation of the Navy Department as to persons in the Navy or in any other branch of the United States service while serving pursuant to law with the Navy, and signed by the Major General, Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced be prima facie as to any of the following facts stated in such certificate :

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service.

It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same.

(2) Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for, and no period herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of competent jurisdiction: *Provided*, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the termination of the war.

SEC. 602. That any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion



or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require.

SEC. 603. That this Act shall remain in force until the termination of the war, and for six months thereafter: *Provided*, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided, the due exercise or enjoyment of which may extend beyond the period herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of the proceeding, remedy, privilege, stay, limitation, accounting, or transaction aforesaid.

SEC. 604. That this Act may be cited as the Soldiers' and Sailors' Civil Relief Act.

Approved, March 8, 1918.

THE HISTORY OF THE SOLDIERS' AND SAILORS'  
CIVIL RELIEF ACT (WITH EXPLANATORY NOTES  
TO THE DIFFERENT SECTIONS AND A DISCUS-  
SION OF ITS CONSTITUTIONALITY).

BY MANSFIELD FERRY, SAMUEL ROSENBAUM, AND JOHN H. WIGMORE.

I. INTRODUCTION.

In August last the draft of a Soldiers' and Sailors' Civil Rights Bill was prepared in the office of the Judge Advocate General at Washington. The present writers assisted in preparing that draft. The Secretaries of War and of the Navy joined in a letter commending the draft to the consideration of Congress. On September 11, Senator Chamberlain introduced it as Sen. 2859, and it was referred to the Committee on the Judiciary. On September 18, Mr. Webb introduced it in the House as H. R. 6110, and it was referred to the Committee on the Judiciary, of which Mr. Webb is chairman.

The House Committee zealously spent ten continuous days working over the draft, and produced a new bill, H. R. 6361, which was introduced on September 29 and reported out favorably on October 2 (Report No. 181). On October 4, two days before adjournment, it was unanimously passed after a short but careful debate. It now (January 15) stands on the Senate Calendar. The text here given is that of the bill as unanimously passed by the House of Representatives.

The purpose of the bill as stated in the language of Secretaries Baker and Daniels is "to free persons in the military service of the United States from harassment and injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the nation. It covers such subjects as stay of court proceedings, stay of executions, protection of defendants absent on military and naval service, non-eviction for failure to pay rent, prohibiting foreclosures of mortgages for failure to pay interest, prohibiting lapsing or forfeiture of insurance policies for failure to pay premiums, prohibiting forfeiture of property bought under an installment contract for failure to pay any installment, prohibiting irrevocable sale for nonpayment of taxes, extending the running of statutes of limitations, etc. On the whole, the method of the act consists mainly in *suspending proceedings and transactions during the soldier's or sailor's absence*, so that he may have an opportunity, when he returns, to be heard

and to take measures to protect his interests. Each one of the situations of necessity thus covered was found to have special conditions and circumstances. Not until every aspect of those circumstances had been canvassed was it possible to settle upon a decision as to the right measures to be taken. In other words, no one rule will work justice in all of these situations."

The secretaries further stated "that is one reason why the acts of this kind passed by most of the states at the time of the Civil War, and the acts that have recently been passed by some half dozen states for the present war, are ineffective; they attempt to lay down an unbending rule—a sweeping exemption from civil process—and thus they go too far in some cases and not far enough in others. Another reason why they are defective is that they are all fragmentary. Several of them cover only the subject of stay of court proceedings. In fact, the special reasons why the office of the Judge Advocate General of the army was led to prepare this draft was the observation that a comprehensive and consistent measure, prepared in view of all the situations arising for the soldier, was at this time much needed."

How unfortunate is the condition of many thousands of men now in the camps would hardly be credited by one who had not reflected on their situation and observed the facts. If ever a measure of relief was needed, and needed promptly, this is one. Out of hundreds of testimonies, the following must here suffice. It is a letter received by a congressman from a drafted man; and it states the case so poignantly that no further explanation is needed:

"Dear Sir: I wrote you a few months ago, before the passage of the draft act, about making some effort to secure the passage of a moratory law, at least suspending the indebtedness due on a home being purchased and paid for by a man subject to draft or actually drafted until his return and for a reasonable length of time thereafter to permit him to take care of his interests, but up to the present time I have noticed no effort put forth in this direction by any member of Congress.

"Now, here is my predicament: I purchased a home two years ago on the installment plan, as thousands of others have, and have kept up my payments, taxes, insurances, etc., by real sacrifices and hard struggling. I have built up my business in that length of time to where I felt that I could assume the responsibilities of marriage. I did marry on

June 2, a few days after the passage of the draft act. Of course, it was necessary to furnish my home, which I did, but, like many others, I was unable to pay all cash, so I have paid for the greater portion of same on the usual installment plan.

"I am now drafted and will be called either on the 19th instant or the 3d of October. I have called on my creditors and tried to arrange for them to carry my account or notes, which they refuse to do, and say they will have to foreclose, although I have a good equity in my home as well as in my furniture.

"Now, I am not kicking on having to serve my country at this time and expect to give the best in me in her behalf, but I do feel that my country should show some appreciation of my efforts and assist me to save my little accumulations, which is all in this world I have. The way things now stand I am stripped of everything on earth I have and am thrown out to make a living for my wife on \$30 per month just because I happened to marry a few days after the passage of the draft act, although it had been contemplated for months beforehand. Of course my business is destroyed, and I have no income whatever other than my business, and the minute I am gone that stops. My obligations would not be burdensome if I could remain here, but when I am ordered away I give up every penny in the world I have.

"I am not asking to be exempted; all I ask is that my Government, who in a manner is breaking up my home and taking everything on earth I have, make some provision by which I can save my equities and take care of my family. If she will do this, I can go with a light heart and a good spirit; otherwise I feel that I ought to be exempted.

"I have two brothers who are now in the army in Mississippi. One of these brothers I have sent to college for the past two years, and I feel that in the face of those facts my government is really requiring more of me than the occasion actually demands, and, too, when there are thousands that could go without any sacrifice whatever.

"Now, as stated before, I am willing to go, even though it necessitates the sacrifice of everything I have, as it is now doing, but I do feel that at the present time the demand on our government does not require it to force me to make such a sacrifice when there are so many who would not have to do so."

ARTICLE I.  
GENERAL PROVISIONS.

PURPOSE OF THE ACT.

NOTE TO § 100.

As stated by Secretary Baker and Secretary Daniels in their joint letter of September 1, 1917, urging the earliest possible consideration of this bill, its general purpose "is to free persons in the military and naval service of the United States from harassment and injury to their civil rights during their term of service, and to enable them to devote their entire energy to the military needs of the nation."

The general scheme upon which this bill was drawn contemplates that no hindrance shall be placed in the way of the commencement of actions against soldiers and sailors. However, wide discretionary powers are conferred upon all courts in which actions may be commenced to grant upon application at any stage a stay of an action or proceeding commenced against a soldier or sailor for any purpose. This is a departure from the principle followed in most of the statutes of the states at the time of the Civil War and in the few already enacted in view of the present emergency; these generally adopt the plan of conferring upon all persons in the military service of the nation a sweeping exemption from process. Such an exemption is too broad, for there are many cases where the financial ability of soldiers to meet obligations in some way is not materially impaired by their entrance into service.

Another general scheme which it was decided not to follow was that of rendering invalid all judgments rendered against soldiers and sailors during the period of service.

Still another rejected principle is that of the English act of 1914, by which the obtaining of a judgment upon any claim is encouraged, but no execution can issue without the leave of the court. The objection to both the foregoing methods is the uncertainty and doubt thrown upon the validity of all judgments (most of which are not against soldiers and sailors) and upon rights acquired by innocent third parties under them.

This bill, in addition to reposing in the courts a discretion to grant a stay of any action or execution at any stage, deals also specifically with contracts which impose a continuing liability upon a soldier or sailor during his term of service. These include such contracts as those for policies of insurance, rent for dwellings,

interest on mortgages on property used for dwelling or business purposes by the soldier or sailor or his dependents, and purchase of real or personal property by installment contracts calling for the payment of installments during the period of military service; and the same principle is applied to liability for taxes on property. In these cases the creditor is generally given by the terms of the contract the right to exercise certain remedies without the intervention of a court; but this bill prohibits or restrains the exercise of such remedies and preserves intact for the time being, as far as possible, the rights of the soldier and sailor. This is accomplished mainly by requiring the creditor to exercise all such remedies only by leave of court or to institute an action in court which then becomes subject to the general provisions for stay of action and execution.

#### DEFINITIONS.

##### NOTE TO § 101.

The bill is intended to protect soldiers and sailors while absent on duty in the present war. Owing to the great variety of branches or arms of the service, in both army and navy, a careful definition is necessary of the persons intended to be given the benefits of the act. These definitions have been prepared by officers of the army and the navy who are perfectly familiar with the usages and terms, and the wording is believed to be adequate both to include all those who need the protection of the act and to exclude those who do not need it.

##### NOTE TO § 102.

Under the power to raise and support armies and to raise and maintain a navy, Congress plainly has the implied power to enact such measures as are necessary for the most effective use of the armies and of the navy. Under this war power the provisions of this bill can constitutionally touch matters which in times of peace are subject solely to the powers of state legislation. Furthermore, there are certain limitations upon the state legislatures, such as the prohibition upon impairing the obligation of contracts, which do not affect the powers of Congress. The provisions of this bill, therefore, though limited mainly to judicial remedies, are in some instances extended to suspend the exercise of substantive rights for the time being.

## ARTICLE II.

## GENERAL RELIEF.

## REPRESENTATION BY ATTORNEY.

## NOTE TO § 200.

This section aims to avoid the total suspension of legal proceedings by providing (sub-section 3) that if in any manner the court learns that the defendant in a proceeding who is not represented is a soldier or sailor, an attorney may be appointed to represent him and protect his interests. In such cases, therefore, the court may feel justified, where the facts so disclose, in proceeding to a hearing in the defendant's absence.

This section further imposes a requirement (sub-section 1) upon plaintiffs in every action, no matter against whom commenced, where no appearance is entered on behalf of the defendant, that before being entitled to take judgment for default of appearance the plaintiff shall file an affidavit to the effect that the defendant is not a soldier or sailor. It is estimated that in not more than 15 per cent of all actions commenced can judgment be taken for default of appearance; in a very large proportion of these the plaintiff will be able without difficulty to swear that the defendant is not a soldier or sailor. In those cases this requirement cannot be objected to. Again, in a large number of the remaining cases the plaintiff will know definitely that the defendant is a soldier or sailor; in those cases it will be his duty, in his effort to obtain a valid judgment, to ask the court to appoint an attorney to represent the absent defendant. The only hardship for plaintiffs, therefore, will occur in those cases where the plaintiff really does not know whether or not the defendant is a soldier or sailor; in those cases also he will have to ask to have an attorney appointed for the defendant, if he wishes to protect himself against the possibility of the judgment being opened (under sub-section 4) after the return of a defendant who in fact is a soldier or sailor. It is considered that, as it applies to a very small proportion of all cases commenced, this is no undue hardship, in view of the benefits bestowed upon absent soldiers and sailors.

An additional protection is conferred by the provision (sub-section 4) that until 30 days after the death or discharge of a soldier or sailor any judgment rendered against him during his absence, without a real defense, may be opened by the court upon a proper showing. Furthermore, if it can be shown on behalf of a soldier or sailor defendant who is absent that the

plaintiff is irresponsible, the court is given power (sub-section 1) to require the plaintiff to furnish security for restitution before being permitted to take the defendant's property in execution. This will discourage the collusive transfer of claims to irresponsible persons for the purpose of such suits.

#### STAYING OF ACTIONS.

##### NOTE TO § 201.

The court is here given a discretion in any case, on its own motion, to stay a proceeding. Next, if application is made on behalf of the soldier or sailor defendant, the court must grant a stay, unless it believes the defendant is able to pay. The stay may be granted for such time and on such terms as will be found specified below in section 204.

#### RELIEF FROM PENALTIES.

##### NOTE TO § 202.

This section is auxiliary to section 201, covering a frequent class of cases.

#### STAY OF EXECUTION, ETC.

##### NOTE TO § 203.

This section provides for the stay of executions, thus supplementing section 201, which provides for stay of the proceedings prior to execution.

#### TERMS OF STAY.

##### NOTE TO § 204.

This section is specifically referred to in every place in the act where a court is given power to grant a stay at any stage of any kind of proceeding. It should be noted that by this section the stay may be made to extend either for the entire period of service or for any shorter period, in the discretion of the court.

It should also be noted that the court is hereby given power to impose terms upon the granting of a stay. The most important of these is the power to order payment by installments. It has not been the practice of American courts to make their judgments payable by installments, although the practice of permitting execution to issue against a certain proportion of the defendant's wages or income over a period of time is familiar in some states. The ordering of payment of judgments in installments has, how-



ever, long been followed by the English county courts in all cases of judgments under \$100; it is conceived that this is an exceedingly beneficial jurisdiction, as it will obviously be possible for many soldiers or sailors who have no dependents to make payment by installments toward the liquidation of their debts.

The section further provides that where there are co-defendants the court may permit the plaintiff to proceed with his action against such co-defendants; this applies particularly to cases where (under most of the codes) various causes of action may be joined in one proceeding.

#### STATUTE OF LIMITATIONS.

##### NOTE TO § 205.

A provision to this effect is familiar in the war legislation of almost every American state at the time of the Civil War. The section here drafted seeks to express in the fewest possible words the various benefits which the old war legislation created in this regard.

#### ARTICLE III.

#### RENT, INSTALLMENT CONTRACTS, MORTGAGES.

##### RENT.

##### NOTE TO § 300.

This is the first of the sections in which the creditor is prohibited expressly from resorting to remedies made available to him by the terms of the contract; he is required to get the leave of court before exercising his summary rights. The purpose of this section is to assure dependents of persons of small means that they will have time in which to work out their difficulties. It is estimated that the rent for three months is a fair average of annual profit derived from the rent of a small dwelling, and that no harsh burden is cast upon a landlord who is required to wait three months before regaining possession of his property and running the risk of losing that much rent. Again, the court is given a discretion to refuse even that much extension or to make an order for payment by installments.

The power here given the Secretary of War and the Secretary of the Navy to order a compulsory allotment of a soldier's pay is considered necessary to supplement the other provisions, as there may be cases where a soldier could allot his pay but fails to do so. Under the War-Risk Insurance Act also (secs. 201 and 209) the

Secretary of War and the Secretary of the Navy are given power to order compulsory allotments of pay; that act makes the matter subject to the regulations they prescribe, and this section merely complements and fits into that one, in that by those regulations the Secretary of War may provide for the case of rent specifically. The allotment for rent may be carved out of the family allotment or added to it, as the regulations may require. The possibility of obtaining such allotments will tend to make landlords more lenient in allowing shelter beyond the maximum three months provided in this bill.

#### INSTALLMENT CONTRACTS.

##### NOTE TO § 301.

Here again the vendor is checked in the use of any remedy the written contract may confer upon him to retake property without the action of a court; he is required to institute an action in which the court is given power to grant a stay subject to the terms previously described.

#### MORTGAGES.

##### NOTE TO § 302.

The general effect of this section is also to prohibit the exercise of summary remedies granted by the contract and to require the mortgagee to go into court for his remedy. The section is, however, limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes. This is on the theory that where the interest of a person in service are of the character that may be defined as investments there does not appear to be pressing need for protection; some sacrifices must be made, and it is thought that the duty of Congress to persons called into service will be accomplished if such person can be made to feel that their own homes and any small business upon which they are dependent are afforded some protection during the war.

#### ARTICLE IV.

##### INSURANCE.

##### NOTE TO ARTICLE IV.

The chief protection required here is that policies of insurance and membership in societies giving insurance benefits shall not be lapsed or forfeited because premiums are not paid during the

absence on service. The method here adopted is, in effect, to make the government the guarantor of payment for all premiums due from persons in military service and to subrogate the government to all equities due under policies on which it may have paid premiums.

The details are too elaborate for further explanation here.

This section covers an entirely separate field from the insurance provisions of the War-Risk Insurance Act. That act gives *new* insurance to soldiers and sailors as a boon from the government; this section protects rights in insurance *previously bought* by the soldier or sailor with his own money and already in force.

#### ARTICLE V.

##### TAXES AND PUBLIC LANDS.

###### TAXES.

###### NOTE TO § 500.

The effect of this section is to suspend the indefeasible sale of land for nonpayment of taxes which fall due during the war. This section is also limited to property used for dwelling or business purposes by the soldier or sailor or his dependents.

###### PUBLIC LANDS.

###### NOTE TO § 501.

There have already been several acts and a resolution passed by the present Congress on this subject. This section merely enacts a general provision in order to make certain that, if any part of this subject has not been covered by the specific enactments so far made, such rights will be hereby protected. It also serves the purpose of pointing out, in this comprehensive act, other remedies reacted which might pass unnoticed by laymen.

#### ARTICLE VI.

##### ADMINISTRATIVE REMEDIES.

###### EVASION.

###### NOTE TO § 600.

This section makes it useless for ingenious debtors to seek to obtain the benefits of this act by colorable transfers or assignments to persons who are or may become soldiers or sailors.

## EVIDENCE.

## NOTE TO § 601.

This section is designed to remove difficulties that might occur in the manner of satisfying any court of the fact of service as a soldier or sailor and of establishing the fact of the death of any one in military service. It does not make a hard and fast requirement that a certificate shall be furnished in all cases, but suggests that to be a most satisfactory method. The statement in the certificate is subject to rebuttal.

## ORDERS MODIFIED OR REVOKED.

## NOTE TO § 602.

In many cases when a court makes an order granting a stay upon certain terms or orders the payment of installments in a certain manner, it will subsequently develop that the soldier or sailor is less able to comply with such order than he was at the time it was made, or that it would be just to modify the order or vary it in some other way. This section provides for such contingency.

## DURATION OF ACT.

## NOTE TO § 603.

In most of the sections of this bill specific periods of time are fixed during which the benefits of the section may be asked for. However, the general sections as to the granting of stay of actions and executions should remain in force not only during the war but for a reasonable time thereafter, in order to give soldiers and sailors a fair opportunity to return and resume their civil activities. For this purpose the provisions of the bill are kept in force for six months after the treaty of peace.

## SHORT TITLE.

## NOTE TO § 604.

It is desirable to have an official short title by which the act may be conveniently referred to not only in future amendatory legislation but on the numerous occasions when it will be cited in applications made and proceedings commenced in courts all over the country.

## TOPICS NOT INCLUDED.

A number of subjects were considered for inclusion in this bill but were rejected for various reasons. In the cases of partnership and bankruptcy it was at first thought desirable to prohibit proceedings adverse to the soldier or sailor looking to dissolution or bankruptcy; it was, however, decided to be unwise to make any absolute prohibitions on legal proceedings. The discretion granted in the act to stay proceedings was considered sufficiently broad to cover all special cases.

The subjects of probate proceedings and trusts were likewise omitted. Those bodies of law can hardly be dealt with for soldiers and sailors without interfering with the adjustment of rights of all decedents' estates whatsoever.

Personal service and delivery contracts were omitted, as no relief could be given in respect to them without assistance from the Treasury, and it would be impracticable to require reinstatement in statu quo after the war.

Civilian relief, such as has been enacted in England to meet difficulties directly attributable to war conditions, was considered to be beyond the scope of this bill.

## III. CONSTITUTIONALITY.

The measure was presented to the federal Congress as a federal measure, for the reasons stated in the letter of the Secretaries of War and the Navy, as follows:

"As to the way of giving effect to this measure, viz., as a federal or as a state enactment, it is our firm conviction that it should be presented as a federal measure under the war powers of Congress. That such war powers will amply support a measure which is designed to protect the soldier and the sailor from harassment during his absence, is unquestionable. But the amplitude of the war powers for the present purpose is so certain that we will not delay here to offer further reasons on that score.

"As the separate states have no war power, and as they are subject to a limitation as to impairing the obligations of contracts, it may be assumed that one or more of the measures here proposed would be beyond the constitutional powers of state legislatures. Nevertheless, since one or more of the states will undoubtedly, to the extent of their constitutional powers, enact laws upon one or more of the subjects herein

covered, it is not believed that such a duplication would be inconsistent or incongruous with a comprehensive enactment by the Congress of the United States. On the other hand, such a duplication might prove to be highly desirable. The reason for taking this view is that the task of the Provost Marshal General, accomplished under the selective-service law, has revealed the most remarkable and gratifying spirit of co-operation universally prevalent on the part of the governors and other authorities of the several states, in carrying out with the federal government a measure of national necessity and welfare. Under the system so wisely provided by the Selective-Service Law the President, instead of intruding into the several states an exclusively federal institution for the purpose of taking out the citizens of those states to serve in the army, invites and appoints the governors and local authorities of the states to co-operate with him, and, in fact, to do most of the labor themselves. There is nothing to show what would have happened had any of the states disputed the authority of the President to call for these services. But, under the circumstances, extending as he did his invitation and invocation to every governor to respond and to co-operate loyally and place the forces of his state at the disposal of the President, the response was unanimous and complete.

"The undoubted and unique success, on so enormous a scale, of this method of inviting the voluntary co-operation of the state authorities for a federal purpose has convinced us that a similar method can be applied in enacting the measure here presented, which is so vital to the welfare of the American army and navy, but which will ultimately depend for its successful carrying out upon the loyal co-operation of the courts in every state."

What light do the authorities give us as to the constitutionality of such a measure?

#### (I) FEDERAL POWERS.

Somewhere in the structure of the state of federal governments must lie the power to take whatever measures may be desirable to enable the Union of the states to protect its life against attack from whatever source, and this power must of necessity be as broad as the menace is grave.

The federal Constitution has given to the Congress the power "to provide for the common defense and general welfare of the

United States" and "to declare war \* \* \* to raise and support armies \* \* \* to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers";<sup>1</sup> it also provides that "the President shall be Commander in Chief of the Army and Navy of the United States."<sup>2</sup> These are what are commonly called the "war powers" of Congress and of the President, and under the Constitution are plenary.

When Congress declares war, by that declaration it puts in force the laws of war; and the war powers of the Government which are not to be exercised, under the Constitution, in times of peace, now come into full force by virtue of the Constitution and are to be exerted by the President and Congress. After the declaration of war every act done in carrying on the war is an act done by virtue of the Constitution, which authorizes the war to be commenced. Every measure of Congress, and every executive act performed by the President intended and calculated to carry the war to a successful issue, are acts done under the Constitution, whether the act or the measure be for the raising of money to support armies or a declaration of freedom to fill their ranks and weaken the enemy; whether it be the organization of military tribunals to try traitors or the destruction of their property by the advancing army without due process of law, and the validity of such acts must be determined by the Constitution. (*McCormick et al. v. Humphrey*, 27 Ind. 144, 154.)

Any legislation which is conducive or convenient or appropriate to the purpose and which is not specifically prohibited by the Constitution is authorized by the Constitution. Congress may exercise its judgment in the selection of means, and is not limited to those only which are indispensable or absolutely necessary, or without which the end could not be satisfied.

These principles of constitutional construction were enunciated in the oft-cited opinion of Chief Justice Marshall in the case of *McCulloch v. Maryland* (4 Wheat. 316). In speaking for a unanimous court he said:

<sup>1</sup> Article I, sec. 8, Constitution of the United States.

<sup>2</sup> Article II, sec. 2, Constitution of the United States.

But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional.

Somewhat similar language was used by the Supreme Court of Louisiana in the case of *Mechanics and Traders Bank v. Union Bank* (25 La. Ann. 387), afterwards affirmed by the United States Supreme Court, which involved the power of the President to establish temporary courts in captured territory. The Louisiana court said :

But in the exercise of war powers the United States is not restrained by the limitations which the Constitution imposes on it as a sovereign. Its business as a warrior is to conquer, to restore peace, and to maintain the Government; and it can use any means necessary to that end, regardless of all restraints except the law of nations.

Under the Constitution the United States has the right to make war, to raise and support armies and navies, to suppress insurrections, and repel invasions. The measures to be taken in carrying on war and to suppress insurrections are not defined, and the decision of all such questions is in the discretion of the government, to whom these powers are confided by the Constitution.

An act to protect persons from the impairment of their civil rights while they are in the military or naval service of the United States is a mere act of justice to those who leave their homes in the service of their country, and is inherently within the power of Congress. Such an act is of particular importance today, when enrollment in the military or naval forces so often means service beyond the seas without facilities for easy or quick communication.

In the days of the Civil War, when through insurrection or the interruptions of the court it was frequently impossible to serve with process persons against whom causes of action had accrued,



Congress passed an act which was approved June 11, 1864 (13 Stat. L., 123), extending the period within which such actions must be begun.

The construction and constitutionality of this statute came before the Supreme Court, and in the case of *Stewart v. Kahn* (11 Wall. 493) it was held that it was constitutional.<sup>2</sup> In this case Mr. Justice Swayne, in behalf of the court, said:

The Constitution gives to Congress the power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water, to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions.

\* \* \* Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrections are not defined. The decisions of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the laws.

In the latter case the power is not limited to victories in the field, and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its use and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrection. It is a beneficent exercise of this authority. It only applies coercively the principle of the law of nations, which ought to work the same results in the courts of all the rebellious states without the intervention of this enactment.

\* \* \* The act is within the canons of constructions laid down by Chief Justice Marshall in *McCulloch v. Maryland* (4 Wheat. 316).

<sup>2</sup>The federal statute involved (13 Stat. L. 123) reads as follows:

"That whenever during the continuance of the present rebellion any action, civil or criminal, shall accrue against any person, who by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judicial proceedings, can not be served with process for the commencement of such action or arrest of such person.

"Or whenever, after such actions, civil or criminal, shall have accrued, such person can not by reason of such resistance of the law or such interruption of judicial proceedings be served with process for the commencement of the action.

"The time during which such action shall be beyond the reach of judicial process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

The power of Congress is thus established beyond question to pass legislation relating to the limitation of actions where such actions are affected by a state of war; for while *Stewart v. Kahn* directly decided the constitutionality of a statute providing for suspending the statute of limitations where a defendant could not be served owing to the vicissitudes of war, the protection of soldiers and sailors who are engaged in the military operations of the United States is clearly within the principle of the case.

The same case of *Stewart v. Kahn* also held that the federal statute of June 11, 1864, was controlling upon state as well as upon federal courts, and its decision has been approved in subsequent cases decided by the Supreme Court.<sup>4</sup>

That within the limitations of the Constitution federal legislation is supreme, and that state courts are thus bound by federal statutes (even though thought by the state court to be inconsistent with the policy of the state) is finally established by the decision of the Supreme Court in the *Second Employers' Liability cases*.<sup>5</sup>

## (II) STATE POWERS.

In the past, by a stay of proceedings or similar means the states have almost universally tried to give protection against suit to soldiers and sailors engaged in the military service of the United States in time of war, but a large part of their legislation has been held, either by the Supreme Court of the United States or by their own supreme courts, to fall within the inhibition of the federal Constitution against the impairment of the obligation of contracts.<sup>6</sup> It is perhaps superfluous to point out that this provision of the Constitution applies only to legislation by the several states and does not limit the right of Congress in its discretion to enact a law impairing a contract.<sup>7</sup> The pages of state legislation on this subject are an acknowledgment of the need of such remedial legislation, which in its effect must touch the enforcement of many contracts, such as mortgages, life insurance

<sup>4</sup> See *Brown v. Walker*, 161 U.S. 591, 607; *Mayfield v. Richards*, 115 U.S. 137, 143; *Harrison v. Meyer*, 92 U.S. 111; *Caperton v. Bowyer*, 31 U.S. 216; *U.S. v. Wiley*, 78 U.S. 508.

In *Mayfield v. Richards* the court said: "The question thus raised was expressly decided by this court in the case of *Stewart v. Kahn* (11 Wall. 493), where it was held that the act applied to cases in the court of the state as well as those of the United States, and that thus construed the act was constitutional. We are satisfied with the judgment of the court in that case, and are unwilling to question or re-examine it."

<sup>5</sup> *Second Employers' Liability Cases*, 223 U.S. 1, pp. 55 et seq.

<sup>6</sup> United States Constitution, Article I, section 10: "No State shall \* \* \* make \* \* \* any law impairing the obligation of contracts."

<sup>7</sup> *Sinking Fund Cases*, 99 U.S. 718.

policies, leases, etc. But even if the state statutes were always effective and had been held constitutional, a serious objection to them would be their lack of uniformity, with the resultant unequal protection given to soldiers doing exactly the same service for their country but who chance to come from different states.

Even in the War of 1812 legislation was enacted by a state to temper the proceedings of courts of justice to the exigencies of war, and on December 18, 1814, Louisiana passed an act suspending "all proceedings in civil cases until the first of May" following. The court held that even this short delay in the remedy constituted an impairment of the obligation of the contract, but felt nevertheless that the statute was justified by the critical condition of New Orleans caused by the British advance and thus was valid in spite of its inconsistency with the letter of the federal Constitution.<sup>8</sup>

But it was not until the Civil War that so-called "stay laws" became prevalent. Many of the states suspended the running of the statutes of limitations, at least in so far as they affected soldiers and sailors.<sup>9</sup> Such statutes having to do with the remedy, there was never any doubt of their constitutionality<sup>10</sup> unless they attempted to revive actions which had already been outlawed by a previous statute.<sup>11</sup> But a considerable number of states went much further and attempted, either by an exemption from process, a stay of proceedings, a stay of or an exemption from levy and execution or a suspension of the courts themselves,<sup>12</sup> effectively to bar the road against any creditor who desired to push his remedy against a defendant in military service. Other states provided for a reopening of the judgment.<sup>13</sup>

<sup>8</sup> *Johnson v. Duncan*, 3 Mart. (La.) 530 (1815).

<sup>9</sup> For example see IOWA, chapter 11, section 4, Laws of Extra Session of 1862; TEXAS, constitution, 1869, Article XII, section 43; VERMONT, chapter 63, section 20, General Statutes 1863.

<sup>10</sup> *MacFarland v. Jackson*, 137 U.S. 258. IOWA, *Edwards v. McCaddon*, 20 Ia. 520. FLORIDA, *Hart v. Bostwick*, 14 Fla. 171 (1872). KENTUCKY, *Trinkle v. Vaughn*, 69 Ky. (6 Bush.) 544 (1869). MISSISSIPPI, *Hill v. Boyland*, 40 Miss. 619 (1866); *Buchanan v. Smith*, 43 Miss. 90; *Mister v. McLean*, 43 Miss. 268. TEXAS, *Bender v. Crawford*, 33 Tex. 746 (1870). VERMONT, *Cardell v. Carpenter*, 43 Vt. 84 (1870).

<sup>11</sup> *Shelby v. Guy*, 11 Whent. (U.S.) 361.

<sup>12</sup> See, for examples of —

Exemption from process, act of April 18, 1861, Gen. Laws of Penn., 1861, No. 377, sec. 4, p. 409.

Stay of proceedings, act of April 30, 1862; Acts of Mass., 1862, ch. 188, p. 152.

Stay of execution, act of May 21, 1861, Laws of Penn., 1861, No. 696, p. 770.

Exemption from execution, act of December 10, 1861, Acts of Alabama, 1861, No. 33, p. 33.

Suspension of the courts, act of May 25, 1861, Acts of Kentucky, 1861, May session, ch. 38, p. 2.

<sup>13</sup> See act of April 30, 1862, Laws of Mass., ch. 188, Laws 1862.

There is an irreconcilable conflict of the decisions of the state courts upon the constitutionality of these various statutes, with the preponderance of authority holding that such statutes are an impairment of the obligation of contracts, and hence void. This was the view of the court in *Coffman v. Bank* (40 Miss. 29, 1866), where the statute of December 11, 1865, suspended all laws for the collection of debts until January 1, 1868. The court said:

The power of the legislature over remedies is not without restrictions, and any legislation which impairs the value and benefit of the contract must impair the right intended to be secured by the contract and comes within the evil intended to be prohibited by the construction. For though the particular remedy existing at the time of making the contract is not an essential part of it, yet no contract would be of any value without a remedy to enforce it \* \* \* And though the party may have no right under the contract to any particular remedy, yet he has a right, at all times, to some adequate and available remedy to enforce it, and that is manifestly within the contemplation of the contract. Hence it has been held generally \* \* \* that acts of the legislature preventing all legal remedies on contracts, or so changing and obstructing them as materially to impair the value and the benefit of the contract as it existed when made, are violations of the contract and within the prohibition of the Constitution of the United States.

But the highest court of Pennsylvania suggested that "stay laws" were not within the prohibition of the Constitution against the impairment of the obligation of contracts if the suspension of the remedy was reasonable and for a definite term, and so considered constitutional a law the effect of which was to give a maximum stay of 3 years and 30 days.<sup>14</sup>

The opinion of Mr. Justice Woodward in this case embodies the principal arguments in favor of the constitutionality of such statutes. He says:

The principal question upon the record is whether this section be constitutional. \* \* \* It is a stay for a term—the term for which he (the soldier) shall be engaged. The act of Congress of the 22d of July, 1861, \* \* \* fixed the term at not more than three years nor less than six months \* \* \* The term of engagement therefore during which

<sup>14</sup> *Breitenbach v. Bush*, 44 Pa. St. 313 (1863); cf. *Clark v. Martin*, 3 Grant (Pa.) 393 (1863).

the above act meant that the defendant should not be subject to civil process was three years from the date of his muster, if the war should last so long, and if not, then until it should end.

Was the legislature authorized to enact this section?

We have often said that stay laws, exemption laws, and limitation laws are ordinarily constitutional, though applied to existing and prior contracts, and we have followed the distinction which prevails in the Supreme Court of the United States between the obligation of a contract and the remedies furnished by law for enforcing the obligation. We understand the rule to be that whilst the legislature may not impair the obligation they may modify the remedy. \* \* \* The time and manner in which stay laws shall operate are properly legislative questions and will generally depend \* \* \* on the sound discretion of the legislature according to the nature of the titles, the situation of the country, and the emergency which leads to the enactment. Cases may occur where the provisions of a law may be so unreasonable as to amount to a denial of right, and call for the interposition of the court.

\* \* \* It may be inferred that in respect to contracts which do not treat of remedies we hold any law to be constitutional which gives a stay for a time that is definite and is not unreasonable, but unconstitutional if the stay be for an indefinite time, or for a time that is unreasonable, though definite. The present stay is a long one — longer than is usual — longer than can be justified except by most peculiar and pressing circumstances. \* \* \* The enforced delay of a civil right, the deterioration of the mortgaged estate, and the consequent pecuniary loss, are entitled to great consideration in judging of the reasonableness of the law.

Yet it is impossible to separate this question of reasonableness from the actual circumstances in which the country found itself at the date of the law. Eleven states had seceded or revolted. \* \* \* In the judgment of the President and Congress, \* \* \* the occasion required an immense increase of the army and navy.

Now if a stay of execution for three years would not be tolerated in ordinary times, did not these circumstances constitute an emergency that justified the pushing of legislation to the extremest limit of the Constitution? \* \* \* In the nature of things there is nothing unreasonable in exempting a soldier's property from execution while he is absent from

home battling for the supremacy of the Constitution and the integrity of the union. \* \* \* If the term of indulgence seems long in this instance, it was not longer than the time for which the President and Congress demanded the soldiers' services. \* \* \* Basing ourselves on what they did, constitutionally the question for us is whether the stay granted by our legislature to our citizen soldiers was unreasonable. In view of the extraordinary circumstances of the case, we can not pronounce it unreasonable. We see in it no wanton or careless disregard of the obligation of contracts, but only a sincere effort to enable the general government to prosecute with success a war which, in its exclusive right of judgment, it resolved to wage.

Another circumstance which bears on the reasonableness of the enactment is the provision which suspends all statutes of limitation in favor of the soldier during all the time that he is exempted from process. The provisions were reciprocal and both were reasonable.

Justice Woodward's intimation that the power of a state to pass such legislation is dependent upon the gravity of the national crisis is not a new suggestion, for it was the foundation of the decision of the Louisiana Court in *Johnson v. Duncan* (3 Mart., La., 530, 1815), upholding the constitutionality of a somewhat similar statute.<sup>15</sup>

But such "stay laws" as exempt generally from process or execution, or stay proceedings or execution, or suspend the courts, purport to act only on the remedy and do not directly affect or modify the terms of a contract, and they are held to come within the constitutional prohibition only in those cases where, by almost vitiating the remedy, they indirectly affect the obligation of the contract.<sup>16</sup>

There are, however, many hardships which such general legislation does not touch, yet which have many characteristics in

<sup>15</sup> In this case an act of the legislature of Louisiana passed Dec. 18, 1814, suspended "all proceedings in civil cases until the 1st day of May," 1815.

The court held that the statute was constitutional, saying, while "A law procrastinating the remedy, generally speaking, destroys part of the right, and he pays less who pays later, so that 'an act \* \* \* the obvious effect of which is to relieve debtors by postponing the recovery, and consequently the payment of debts impairs the obligations of contracts and as such, is unconstitutional,' nevertheless under the extraordinary emergency the law was constitutional, for 'at the time the act was approved the enemy was fast approaching, and five days after made his appearance within 5 miles of the city of New Orleans.'"

<sup>16</sup> Cf. *Coze's Ex. v. Martin* (44 Pa. St. 322), where the court said "there is no conflict between the terms of the mortgage and the terms of the law. The mortgage does not say there shall be no suspension of rights. What the plaintiff complains of is that the law-making power which furnished the *scire facias* is interposed to stay it for a season."

common with the cases relieved by the general stay laws and which should be treated with them in any attempt at comprehensive legislative protection to the civil rights of soldiers and sailors. To such a class belong mortgages or deeds of trust which contain a power of sale, life insurance policies, and leases.

To deal with these effectively, a modification must be made in the very terms of the contract, and they are thus directly within the federal prohibition against impairment of the obligation of contracts laid upon the states. The power to sell given by the mortgage contract must be suspended, life insurance which, by the contract of insurance, would lapse from nonpayment of premiums must be continued a reasonable time, and dependents of soldiers who are unable to meet their rent promptly must be given a fair opportunity to pay their rent or find other quarters before they are put in the street.

Virginia, by a statute of March 2, 1866, attempted to suspend the power of sale contained in a deed of trust and its courts promptly held the statute unconstitutional.<sup>17</sup> The court said:

Whenever a subsequent law affects to diminish the duty or to impair the right it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract through professing to act only on the remedy is directly obnoxious to the prohibition of the Constitution, and whenever a sale is required by the terms or law of a contract no law can obstruct or clog it with new conditions without affecting the obligations of the contract, for it can be enforced only by a sale, and the prevention of such sale is a denial of a right. We are bound by these decisions in the interpretation of the Constitution of the United States and need not go further for authority. But the preponderance of authority from the courts of our sister States is to the same effect.<sup>18</sup>

But the Civil War cases cast little, if any, light upon the present constitutionality of "stay laws" when enacted by state legislatures. For within the period since the war a new doctrine of state

<sup>17</sup> *Taylor v. Stearns*, 18 Gratt (Va.), 244, containing, particularly in the briefs of counsel, a valuable collection of cases on the constitutionality of various forms of "stay laws." Cf. *Moore v. Martin*, 38 Cal. 428 (1869), *infra*; *Iglehart v. Wolfen*, 20 Ind. 32 (1863), *infra*; *Scobey v. Gibson*, 17 Ind. 572 (1861), *infra*; *Jacobs v. Smallwood*, 63 N.C. 112 (1869), *infra*; *Jones v. McMahan*, 30 Tex. 719, 735 (*infra*).

<sup>18</sup> See also *Bronson v. Kinsie*, 1 How. (U. S.) 311 (1843), which, however, did not involve any war emergency legislation.



power has been recognized and become firmly established. It is only within the last 25 or 30 years that this great principle of the police power has been evolved, but it is now settled that in this power the states have a power of as yet undefined breadth and elasticity—a power which, when successfully invoked, is not subject to the prohibitions upon the states contained in the federal Constitution.<sup>19</sup> It is under this power that such powers are exercised by public authorities as to dynamite buildings to check the spreading of a conflagration. As Judge Cooley says:

There are other cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to their fellows and to the state, but where, nevertheless, some controlling public necessity demands interference or destruction.<sup>20</sup>

Can there be a higher “public necessity” than war, which involves the very life of the state?

So, though it must be admitted that the states are without any war power, and in spite of the fact that the weight of authority as shown in the note below<sup>21</sup> is distinctly against the constitutional-

<sup>19</sup> Cooley, “Constitutional Limitations,” 6th ed., p. 707.

<sup>20</sup> Cooley, “Constitutional Limitations,” 6th ed., p. 739.

<sup>21</sup> Statutes held unconstitutional:

*Stay of proceedings.*—ARKANSAS—*Burt v. Williams*, 24 Ark. 91 (1862).

*Suspension of remedies.*—ALABAMA—*Hudspeth v. Davis*, 41 Ala. 380 (1867); *Ex parte Pollard*, 40 Ala. 77 (1866). MISSOURI—*Stevens v. Andrews*, 3 Mo., 205. NORTH CAROLINA—*Johnson v. Winslow*, 64 N.C. 27 (1870); *Miller v. Gibson* 63, N.C. 635 (1869); 53 N.C. 366 (1861). SOUTH CAROLINA—*State v. Carew, Sharlock v. Rivers*, 13 S.C. L. 8 Eg. Rep., 498. TENNESSEE—*Webster v. Rose*, 6 Heisk 93.

*Stay of execution.*—INDIANA—*Dormire v. Cogly*, 8 Blackf. 177. KENTUCKY—*Blair v. Williams*, 4 Lit. 34; *Lapsley v. Brashears*, 4 Lit. 47, suspending execution unless plaintiff would accept Kentucky banknotes. PENNSYLVANIA—*Lewis v. Lewis*, 47 Pa. St. 127 (1864). SOUTH CAROLINA—*Crittenden v. Jones*, 1 Car. L. Rep. 385 (1814).

*Suspension of the courts.*—SOUTH CAROLINA—*Wood v. Wood*, 14 Rich. 143 (1867).

*Modification of contract.*—NORTH CAROLINA—*Jacobs v. Smallwood*, 63 N.C. 112 (1869), a statute providing for payments of contracts in four annual installments.

*Alteration of remedies.*—CALIFORNIA—*Moore v. Martin*, 35 Cal. 425 (1869), granting new right of redemption. INDIANA—*Iglehart v. Wolfen*, 20 Ind. 32 (1863); *Scobey v. Gibson*, 17 Ind. 572 (1861), statute granting a year for mortgagor to redeem. TEXAS—*Jones v. McMahan*, 39 Tex. 719, 735, holding unconstitutional a statute making a judgment payable in four equal installments.

Statutes held constitutional:

*Suspension of remedies.*—KENTUCKY—*Barkley v. Slover*, 4 Metc. 44; *Johnson v. Higgins*, 3 Metc. 566 (1861), where the suspension was for five months.

*Stay of proceedings.*—IOWA—*McCormick v. Rusch*, 15 Ia. 127 (1863). MISSOURI—*Edmondson v. Ferguson*, 11 Mo. 344 (1845), Mexican War.

*Exemption from process.*—MISSOURI—*Bruns v. Crawford*, 24 Mo. 330 (1864), as to subsequent contracts. PENNSYLVANIA—*Davidson v. Barclay*, 63 Pa. St. 406 (1869); *Coze's Executor v. Martin*, 44 Pa. St. 322. SOUTH CAROLINA—*Gregg v. Summers*, 1 McCord, 461 (1821).

*Exemption from arrest.*—ALABAMA—*Greening v. Sheffield*, 1 Minor, 276 (1824).



ity of "stay laws" when enacted by states, it is suggested that the Louisiana and Pennsylvania decisions already cited are, in fact, the better law.

Thus, while the power of the federal government must be undoubted to pass anything in the nature of stay laws for the protection of soldiers and sailors in its service in their civil rights, it must be left to the future decisions of the courts to determine whether the state legislatures under the police power may not only impair the remedy, but modify the terms of a contract, even if it be in the teeth of the federal inhibition against impairment of the obligation of the contract by the states.

## THE "SOLDIERS' AND SAILORS' CIVIL RELIEF ACT" IN PRACTICE.

The Civil Relief Act, in its actual operation, has passed through two stages and is just entering on a third.

First came a period of absolute ignorance of, and consequent non-enforcement of, its provisions. After the law had been pending in Congress for some little while it was suddenly passed and signed by the President on March 8, 1918. Little publicity attended its enactment, and the copies of the Act were not generally distributed for nearly two weeks. It resulted that very few persons knew of the law during March. Creditors and debtors alike, and their attorneys, proceeded in the accustomed way. The provisions of the Act were not complied with. Almost no applications were made to the Courts.

During April conditions were quite different. Red Cross workers became familiar with the law and they referred all the cases under the Act which they found in the families under their charge to their attorneys. The Legal Aid Society which receives these cases from the Red Cross in Boston is a good barometer of conditions. Whereas in March it had about ten cases under the Act, in April it had nearly one hundred. Relatively few of the cases go to court because in most instances some disposition is promptly reached by agreement. For the bar in general this stage was one of half-understanding of the law. Attorneys for plaintiffs, creditors, and landlords who were suddenly confronted with the statement that there was a law which affected every such matter in every court, read the Act through hurriedly and gained an impression that if a man was in service nothing could possibly be done, that all their clients' rights were gone, that no case could ever be tried, etc., etc. On the basis of this half-understanding too many lawyers have condemned the Act, intimated that it was unconstitutional, and stated that it was unfair and tended to promote fraud.

The enforcement of the Act is now clearly entering a third stage, which is a period of readjustment. The attorneys who are acting for the Red Cross, and it is they who are doing the bulk of the debtor-defendant's work, realize that the economic problem of credit is involved in the Act, and that if its sweeping provisions are blindly and indiscriminately enforced they will prove a boom-crang. They will destroy all credit for men in service and for

their dependents. No one will lease them premises, no one will sell them goods on credit. Therefore the debtors' lawyers (at least those attached to the Red Cross service) are using the law with restraint and are inquiring closely into the justice of each particular case.

It is very important that there should be a corresponding change on the part of the creditors' lawyers. They should understand that any attempt to use the law to promote fraud can be broken down, and that the mere fact that a man is in service is not final. The question is always open as to whether the fact of absence in service affects the inability to pay the bill. If it does not, all proceedings may go forward. Similarly the staying of actions is entirely in the Court's discretion, so that if it appears that to hear the suit will not prejudice the defendant and failure to hear it will prejudice the plaintiff, the Court may order the matter heard. Judgment may be entered and execution issued, even against a man absent in service, if justice so requires.

If the bar generally will undertake to understand this law it will easily perceive how fair and evenly balanced its provisions are. This is important because in last analysis the success of the law will depend upon the coöperation of the bar. If lawyers can be imbued with the spirit of fairness which permeates the law itself they will then be more ready to consider themselves in a quasi-judicial position and to coöperate with the Court in securing the object of the law, which is to increase the military efficiency of the nation.

There is one complication which was never contemplated by the Act, but which must be faced. In hundreds of cases the wives or other dependents do not receive their allowance and allotment checks promptly from Washington. Thus bills go unpaid, not because of a desire to evade them, but through absolute inability to meet them. This creates a dilemma. Inasmuch as the wife is blameless and as the supreme purpose of the Act is to maintain the morale of our fighting men by assuring them that those at home are being guarded wherever they are blameless, it would seem that the lesser of the two evils is to require the creditors to wait. Undeniably this is a hardship on creditors, but it is probably only a temporary condition. Ultimately all money due from the government will be paid and then the debtors will be able, and most of them will, pay their just debts.

REGINALD HEBER SMITH.

THE PECULIAR SIGNIFICANCE OF THE "SOLDIERS' AND SAILORS' RELIEF ACT" AS A RECOGNITION OF THE PRACTICAL VALUE TO THE COMMUNITY OF GIVING COURTS EQUITABLE POWERS.

In the course of a statement of objections to a proposal to create a separate Equity Court, in "Appendix A" to the report of the Committee on Legislation of this Association for 1913, on page 63 the following statement was made:

"Instead of confining equity powers to one court, we believe the future development of the Massachusetts judicial system will show the extension of equitable powers to *every* court having important civil jurisdiction, and that in the course of time this will be regarded as a part of the natural equipment of a civil court under our system."\*

When that passage was written, it was not anticipated that the most far-reaching step in the direction of this ultimate result would be taken by the National Government as an incident to the exercise of its war powers.

Perhaps this may be a material consideration in connection with the constitutionality of the Act in the following sense — that the nature of the principles of equity, as emanating from the conscience of the king, viz., the people of the United States and of the several states, is such that a state of modern war may present facts which warrant Congress in declaring that the hardship to soldiers and sailors resulting from the fact of their services and, during the period of their services, in the manner specified in the Act, may, on the same principles on which courts act in other equitable matters, furnish a basis for an equitable "stay" of proceedings. Thus this equitable principle annunciated by Congress in the exercise of its war powers becomes, through those war powers, a part of the "Supreme law of the land" by which judges in every state are bound, under Article VI. of the Federal Constitution.

While equity jurisprudence has in general been of more gradual growth, yet in many of the states in this country the prejudice against equitable powers was so strong that for a long time these

\* Equitable defences were made available in all the law courts in March, 1913, by Chapter 307. The probate courts for years have had within their field unlimited equity jurisdiction "concurrent" with the Supreme Court and the Superior Court, by R.L., Chap. 162, Sec. 5, as amended by Chap. 100, 1910. Equity powers within a certain field were given to the land courts by Sec. 1, Chap. 448 of 1904, transferring powers under R.L., Chap. 185, Sec. 9, and R.L., Chap. 128, Sec. 107, contains equitable powers in its midst, although the word "equitable" is not used. See also as to the probate courts, Chap. 151 of 1915.

powers were given to the courts piecemeal by special statutes, although the equitable jurisdiction of the Federal Courts has always been unrestricted. Gradually among the states, however, the restrictions on equity jurisdiction were removed. In view of the hereditary popular prejudice against giving equitable power to judges, therefore, it is interesting to find this most sweeping Act of Congress suddenly giving such power to all the judges in the country for a specific equitable purpose. It may be said to be simply a more rapid creation, but similar in some respects to the more gradual development through equitable considerations in the Courts of Law of the "Action of Assumpsit" or the "Action on the Case."

How far the suggestions in this note are of value the reader may determine for himself, but, as the war has suddenly precipitated the bar of the country into the study of government by "gentlemen's agreement," or a phase of what Dean Pound is apt to refer to as the periodically recurring attempts to administer "Justice without law," perhaps no suggestions are out of place, however attenuated may be their apparent connection with the subject upon first impression.

As pointed out in Mr. Smith's note the jurisdiction is not intended by the act as an arbitrary or capricious jurisdiction but one calling for the fairness of equitable principles.

In view of the legislative history of recent suggestions to revise the Poor Debtor Law in Massachusetts, it will be particularly interesting to Massachusetts lawyers to notice that (by § 204) the equitable power in this federal act is given not only to stay all proceedings, but also to order a judgment rendered by any Court in any case to be *paid in instalments*, thus applying to all cases relating to soldiers and sailors what is practically an equitable process after judgment or "Dubuque" Process.

I understand that such a right to regulate payment of judgment by instalments has, for years, been exercised by the English County Courts, and Mr. Rosenbaum, one of the joint authors of the discussion of the Act, reprinted from the "Illinois Law Review," has made a special study of the English system.

This practice of instalment payments where the circumstances call for it has also been gradually coming into use in America, through the small claims courts in various cities. In Massachusetts, it has hitherto been limited to small claims for necessities under the "Dubuque Act." In 1915 a bill was very carefully drawn (No. Senate 518 of that year), and reported favorably by the Judiciary Committee, passed to be engrossed in both Houses,

and enacted in the House, but finally rejected in the enactment stage in the Senate, in which there was an entire revision of the so-called "Poor Debtor Law." A copy of the bill was sent to every member of this Association. The reason for this bill, as explained in the Report of the Committee on Legislation of this Association for 1915, on page 12, was that —

" . . . it was felt that in view of the development of various modern methods of doing business, and of abusing the opportunities offered by the poor debtor law in connection with such business, the system would be improved, and would work more effectively for the collection of debts and the prevention of fraud, where means of payment were within reach of the debtor, without necessarily involving some of the present opportunities for abuse, if the Court were given more discretion and allowed to adapt its orders to the varying circumstances of the cases which come before it, and that the process of imprisonment should be used to enforce the orders of the Court, after examination into the circumstances, instead of being used as a strict alternative to the ability to take the poor debtor's oath."

In view of this history of the idea in the state legislature, it is interesting to find substantially the same power coming into the hands of the courts of the state for "soldier and sailor" cases, by virtue of an act of Congress.

Possibly this practical demonstration of the fact that the idea has been recognized as valuable for the entire country in these cases may lead to a revival of interest in the proposed revision of the Poor Debtor Law, which was submitted to the legislature in 1915.

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